

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Pamavita, Inc. : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Corporate Tax :  
Procedure under Article 27 of the Tax Law for the :  
Fiscal Years Ending 6/30/76-6/30/79. :

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State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1984, he served the within notice of 1090 by certified mail upon Pamavita, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Pamavita, Inc.  
c/o Harvey R. Poe, P.A.  
160 S. Livingston Ave.  
Livingston, NJ 07039

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
14th day of March, 1984.



  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1984, he served the within notice of 1090 by certified mail upon Harvey R. Poe, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harvey R. Poe  
Harvey R. Poe, P.A.  
160 S. Livingston Ave.  
Livingston, NJ 07039

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
14th day of March, 1984.

David Parchuck

Barbara A. [Signature]  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

March 14, 1984

Pamavita, Inc.  
c/o Harvey R. Poe, P.A.  
160 S. Livingston Ave.  
Livingston, NJ 07039

Gentlemen:

Please take notice of the 1090 of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 4 months of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Harvey R. Poe  
Harvey R. Poe, P.A.  
160 S. Livingston Ave.  
Livingston, NJ 07039  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
PAMAVITA, INC.	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 27 of the Tax Law for the Fiscal Years	:	
Ending June 30, 1976 through June 30, 1979.	:	

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Petitioner, Pamavita, Inc., c/o Harvey R. Poe, 160 South Livingston Avenue, Windsor Plaza, Suite 212, Livingston, New Jersey 07039, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 27 of the Tax Law for the fiscal years ending June 30, 1976 through June 30, 1979 (File No. 31404).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on May 14, 1982 at 9:15 A.M. and continued to conclusion on May 24, 1982 at 9:55 A.M., with all briefs to be submitted by October 15, 1982. Petitioners appeared by Harvey R. Poe, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Robert Plautz, Esq., of counsel).

#### ISSUE

Whether the late filing of petitioner's New York State corporation franchise tax returns and the late payment of the taxes due thereon were due to reasonable cause thereby precluding assertion of penalties under section 1085(a)(1) and (a)(2) of the Tax Law.

FINDINGS OF FACT

1. On or about November 30, 1979, petitioner, Pamavita, Inc., filed its corporation franchise tax reports for the fiscal years ending June 30, 1976 through June 30, 1979. Likewise, the taxes due with said reports were paid late by petitioner.

2. The Audit Division determined that the late filing of the tax returns in issue herein was due to willful neglect and accordingly assessed a penalty under section 1085(a)(1) and (a)(2) of the Tax Law against petitioner for each taxable year as follows:

<u>Petitioner</u>	<u>Year</u>	<u>Amount</u>
Pamavita, Inc.	June 30, 1976	\$2,274.49
	June 30, 1977	\$1,105.42
	June 30, 1978	\$ 460.22
	June 30, 1979	\$ 543.87

3. On or about April 21, 1980, petitioner paid the amounts set forth in the schedule above in payment of the penalties and then filed a timely claim for refund of said amounts with the Audit Division. Said refund claim was disallowed on August 11, 1980.

4. Thereafter, in response to the disallowance, petitioner filed a timely petition for a review of the Audit Division's determination.

5. Paul D'Ambrosio, hereinafter called "Paul", was a fifty percent partner in Five Brothers Carting Co., a partnership of the State of New York, having its principal place of business at 84 William Street, New York, New York. The remaining partner was Paul's mother, Rose D'Ambrosio, hereinafter called "Rose". The partnership was engaged in the business of collecting, hauling and disposing of garbage in the City of New York.

6. Paul was also a fifty percent shareholder of petitioner, Pamavita, Inc., a New York corporation having its principal place of business at 84

William Street, New York, New York, hereinafter called "Pamavita". The remainder of Pamavita's stock was owned equally by Rose and Paul's sister, Vita D'Ambrosio, hereinafter called "Vita". Pamavita's principal asset was a certain parcel of real property, which it leased to the Partnership.

7. Five Brothers Carting Co., Inc., a New Jersey corporation having its principal place of business at 264 Broadway, Jersey City, New Jersey, hereinafter called the "Corporation", was organized for the purpose of engaging in the business of collecting, hauling and disposing of garbage in the State of New Jersey, and to obtain better access to New Jersey dumping sites for the Partnership. On May 1, 1975, Paul moved his entire operation from New York to New Jersey at the aforesaid address. Paul was a fifty percent shareholder in the Corporation and Rose and Vita owned the remaining percentage of the Corporation's stock.

8. Throughout the period in issue herein, by agreement with Rose and Vita, Paul managed the day to day operations of the Partnership and the Corporation. During such period, Paul and Rose derived substantially all of their income from the Partnership.

9. Throughout their respective existences, and until early 1979, when Sally Barton, an accountant in Westfield, New Jersey, was retained, the Partnership, Pamavita, and the Corporation, hereinafter sometimes collectively called the "Companies", and Paul and Rose had retained the services of Paul's brother, Vincent T. D'Ambrosio, hereinafter called "Vincent", an attorney at law of the State of New York, for the purpose of handling all of their respective financial affairs. Petitioner's stockholders considered Vincent a tax expert, as did Vincent himself. Vincent's duties included but were not limited to: maintaining payroll records; preparing payroll checks; paying creditors; paying Federal,

State and City taxes; depositing income and posting same in the appropriate ledgers; preparing periodic financial statements; preparing and filing of all required Federal, State and local income and information tax returns for the Companies, including payroll returns and estimated tax returns; maintaining all of the Companies' ledgers, books and records; preparing analyses of all the financial transactions between the Companies; and, because of the direct affect of the Partnership's financial operations on the individual finances of the Partners, the preparation and filing of the Federal, State and City individual income tax returns of Paul and Rose.

10. Petitioner relied upon Vincent to prepare and file the corporate tax returns in issue; however, he completely neglected to do anything with respect to preparing and filing said returns.

11. Vincent testified that he was aware of all Federal and State laws pertaining to the filing requirements for individual, corporate and partnership income tax returns, since he held himself out as a tax expert and filed such returns for his other clients. Vincent had expertise with respect to maintaining books and records for clients so he was qualified to perform the duties for which he was retained by petitioner.

12. During the years 1976 through 1978, Vincent had complete and full access to any books and records that he would have required or needed to prepare the income tax returns for said years, since he maintained all such books and records at his office. He had access to the books and records at all times.

13. For a period over ten (10) years, 1966 through 1976, Vincent performed all of the duties for which he had been retained by petitioner in a competent and timely manner.

14. During 1976, the Corporation's business began to expand rapidly, necessitating more and more intercompany financial transactions, such as payments between and among the Companies for rent; equipment leasing; shared maintenance; payroll and overhead costs; sales taxes; depreciation; repairs and purchases.

15. Vincent testified that at the same time that the volume of the inter-company financial transactions was increasing, his separate law practice was also expanding, requiring him to spend more time attending to the legal affairs of his other clients. As a result, Vincent began to neglect his duties with respect to petitioner.

16. During 1977 and 1978, instead of abating, the volume of inter-company transactions constantly increased, again preventing Vincent from completing any of the Companies' books and records. Without completing the Companies' respective books and records, Vincent was unable to complete or file any of petitioner's Federal or State income tax returns.

17. Notwithstanding the fact that he had been unable to complete Pamavita's books and records for the fiscal year ended June 30, 1976, or the rest of the Companies' books and records for the calendar year 1977, and therefore did not prepare the income tax returns for said fiscal and calendar years, when questioned by Paul as to the status of the tax returns in early 1978, Vincent advised him that he was working on it. Vincent, however, never completed the Companies' books and records for 1977 or for any period thereafter.

18. When Paul again questioned Vincent in early 1979 as to the status of the tax returns for the Companies, himself and Rose for the years 1977 and 1978, Vincent finally admitted to Paul, that he had not completed his analyses of the Companies' inter-company transactions for either 1977 or 1978; had not



completed the books and records of the Companies for said years, and had not prepared and filed the tax returns in issue.

19. Upon receiving this information, Paul immediately made inquiries within the industry to find and retain an accountant to take over the duties previously performed by Vincent for petitioner. As a result of his inquiries, Paul was referred to Sally Barton, who was immediately retained by the Companies. Ms. Barton, after a short delay caused by her scheduling conflicts, completed all of the Companies' books and records for all periods from and after 1976, and prepared and filed all of the required Federal, State and City tax returns for petitioner for each year with respect to which the Audit Division asserted late filing and late payment penalties. All taxes due were paid together with the accrued interest thereon.

20. The Internal Revenue Service had assessed late filing and late payment penalties against petitioner under Section 6651(a)(1) and (a)(2) of the Internal Revenue Code of 1954 and then subsequently cancelled said penalties.

21. Along with its brief, petitioner filed proposed findings of fact, all of which have been incorporated herein except for the proposed ultimate finding of fact which was not supported by the evidence in this case.

#### CONCLUSIONS OF LAW

A. That paragraphs (1) and (2) of subdivision (a) of section 1085 of the Tax Law levy penalties for failure to file franchise tax reports and to pay the amounts shown or required to be shown thereon in a timely manner, unless "such failure is due to reasonable cause and not due to willful neglect".

B. That 20 NYCRR 9-1.5, effective for taxable years commencing on or after January 1, 1976, provides that grounds for reasonable cause must be clearly established and may include the following:

"(a) death or serious illness of the responsible officer or employee of the taxpayer, or his unavoidable absence from his usual place of business;

"(b) destruction of the taxpayer's place of business or business records by fire or other casualty;

"(c) reliance on advice of a competent advisor such as an attorney or accountant;

"(d) timely prepared reports misplaced by a responsible employee and discovered after the due date."

The above-quoted regulation was amended, effective April 1, 1981, to delete ground "(c)", reletter "(d)" to "(c)", and to add the following grounds:

"(d) inability to obtain and assemble essential information required for the preparation of a complete return despite reasonable efforts;

"(e) pending petition to Tax Commission or formal hearing proceedings involving a question or issue affecting the computation of tax for the year of delinquency;

"(f) any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes. Past performance should be taken into account."

C. That each taxpayer has the obligation to prepare and file a timely return with payment. This duty is nondelegable. Thus, numerous cases have held that a taxpayer's reliance on its accountant or employee will not relieve the taxpayer of its responsibility (e.g., Sanderling, Inc. v. Commissioner, 571 F.2d 174 (3d Cir. 1978); Logan Lumber Co. v. Commissioner, 365 F.2d 846 (5th Cir. 1966); William H. Mauldin, 60 T.C. 749 (1973); 3 A.L.R.2d 617, 619).

D. That "(a)ny layman with the barest modicum of business experience knows that there is a deadline for the filing of returns and knows that he must sign the return before it is filed." In the present case, failure of petitioner's attorney to present it with the returns for appropriate signatures before the due date put it on notice that reliance on its attorney was not an exercise of

ordinary business care and prudence (United States v. Kroll, 547 F.2d 393, 396 [7th Cir.]). Petitioner, therefore, did not demonstrate reasonable cause for failure to file and pay the taxes in issue herein.

E. That the petition of Pamavita, Inc. is denied and the disallowance of refund issued August 11, 1980 is sustained.

DATED: Albany, New York

MAR 14 1984

STATE TAX COMMISSION

*Roderick W. Clem*  
PRESIDENT

*Francis R. Koenig*  
COMMISSIONER

*Mark J. Smith*  
COMMISSIONER